

CHAPTER 3 - APPLICABILITY AND COVERAGE

3-1. General. The Service Contract Act (SCA) (Appendix A) applies to all Federal and District of Columbia contracts in excess of \$2,500 and all subcontracts thereunder, the principal purpose of which is to furnish services in the United States through the use of service employees. In order to assist Contracting Officers in their determinations as to whether prospective solicitations are subject to the provisions of the SCA, the following criteria must be considered:

- a. Will the principal purpose of the contract, as a whole, be to furnish services?
- b. Will service employees be used in providing such services?
- c. Will such services be furnished in the United States?

Each of these criteria will be outlined in further detail below.

3-2. Principal Purpose. As was noted in paragraph 1-5 of this pamphlet, the SCA was enacted after the passage of both the Davis-Bacon Act and the Walsh-Healey Act, and was intended to fill a void in labor standards protection for government contracts. The Act therefore defines a service contract as those which have as their principal purpose the procurement of something other than construction activity (as defined in the Davis-Bacon Act) or materials, supplies, articles, and equipment (as defined in the Walsh-Healey Act). The DOL has provided guidance as well as illustrative examples with respect to the term, "principal purpose" at Sections 4.131 and 4.132 of 29 CFR Part 4.

- a. A procurement that requires tangible items (e.g., vehicles or equipment) be supplied as part of the services being furnished is covered by the SCA, provided that the use of such non-labor items is of secondary importance to the contract's principal purpose of furnishing services.
- b. A single contract which combines both specifications for services and specifications for other different or unrelated work (i.e., covered by the Davis-Bacon Act or Walsh-Healey) is covered by the SCA if the contract as a whole is principally to furnish services. Only the specifications which pertain to services, however, are covered by the SCA. One of the other acts may apply to the non-service specifications.
- c. The proportion of the labor cost to the total cost of the contract and the necessity of furnishing or receiving tangible non-labor items in performing the contract obligations will be considered but are not

1 Aug 01

necessarily determinative.

3-3. Service Employee.

a. The Act covers service contracts only where "service employees" will be used in performing the services to be procured through the contract. Section 8(b) of the Act defines "service employee" as follows:

The term service employee means any person engaged in the performance of a contract entered into by the United States and not exempted under Section 7, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States (other than any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in part 541 of Title 29, Code of Federal Regulations, as of July 30, 1976, and any subsequent revision of those regulations); and shall include all such persons regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.

b. The Act's coverage does not extend to contracts for services to be performed exclusively by persons who are bona fide executive, administrative, or professional personnel as defined by 29 CFR 541. For example, a contract for medical services furnished exclusively by professional personnel is not an SCA-covered contract. Regulatory guidance in section 4.113 of 29 CFR Part 4 further states that service contracts to be performed essentially by such exempt personnel with the use of service employees being only a minor factor in the contract's performance are not covered by the SCA (see, for example, discussion in paragraphs 3-12 and 3-13 of this pamphlet).

c. In contrast, service contracts involving a significant or substantial use of service employees with some use of bona fide executive, administrative, or professional personnel in the contract's performance are SCA-covered contracts. For example, contracts for drafting or data processing services are often performed by drafters, computer operators, or other service employees and are subject to the Act even though the work of such employees may be performed under the direction and supervision of bona fide executive, professional, or administrative personnel.

3-4. Geographic Scope of the Act.

a. The Act covers contract services furnished in the United States, which is defined as any of the 50

states, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf Lands (as defined in the Outer Continental Shelf Lands Act), American Samoa, Wake Island, Commonwealth of the Northern Mariana Islands, and Johnston Island. This definition specifically excludes any other territory under the jurisdiction of the United States and any United States base or possession within a foreign country.

b. Contracts wherein some services are performed inside, and some are performed outside of the United States, as defined in paragraph a above, are covered by the Act. The Act's provisions, however, are applied to only those services performed within the statutory geographic scope.

3-5. Department of Labor Authority. In addressing the applicability of the SCA to prospective or even existing contracts, it must be noted that Section 4 of the Act authorizes the Secretary of Labor to "enforce the Act, make rules, regulations, issue orders, hold hearings, and make decisions based upon findings of fact, and take other appropriate action hereunder." This authority is outlined in greater detail within Section 101(b) of 29 CFR, Part 4. Particularly noteworthy is the Department of Labor's authority to require contracting agencies to modify existing contracts that have erroneously omitted the applicable SCA provisions and wage rates (see 29 CFR 4.5(c)(2)). Further, it should be noted that DOL determinations as to whether or not a particular contract is subject to the Act are not judicially reviewable (Curtiss-Wright Corp. v. McLucas, 381 F. Supp. 657; Brinks, Inc. v. Board of Governors of the Federal Reserve System, 466 F. Supp 112). In this regard, see also the decision of the General Accounting Office in B-221203, dated 12 Dec 85.

3-6. Contracts of \$2,500 or Less.

a. Every contract with the Federal Government which is not in excess of \$2,500 but has as its principal purpose the furnishing of services through the use of service employees shall contain the following clause:

Except to the extent that an exemption, variation or tolerance would apply if this were a contract in excess of \$2,500, the contractor and any subcontractor hereunder shall pay all of his employees engaged in performing work on the contract not less than the minimum wage specified under Section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended. Regulations and interpretations of the Service Contract Act of 1965, as amended, are contained in 29 CFR, Part 4.

1 Aug 01

b. It is also noted that recurring services procured on a monthly rather than annual basis are generally subject to the Act even if the monthly do not equal or exceed the \$2,500 contract threshold for SCA application. The DOL's regulations provide, in relevant part:

...if an agency procures continuing services through the issuance of monthly purchase orders, the amount of the contract for purposes of application of the Act is not measured by the amount of an individual purchase order. In such cases, if the continuing services were procured through formal advertising, the contract term would typically be for one year, and the monthly purchase orders must be grouped together to determine whether the yearly amount may exceed \$2,500. However, a purchase order for services which are not continuing but are performed on a one-time or sporadic basis and which are not performed under a requirements contract or under the terms of a basic ordering agreement or similar agreement need not be equated to a yearly amount. (See 4.142(b).)

3-7. Exempt Contracts. The Act provides for both specific statutory exemptions as well as procedures under which the Secretary of Labor may make such rules and regulations allowing reasonable variations, tolerances, and exemptions to, and from, any and all provisions of the Act.

a. Section 7 of the Act specifically excludes from SCA coverage the following types of contracts:

(1) Any contract for construction, alteration, and/or repair, including painting and decorating of public buildings or public works (i.e., contracts for the procurement of construction activity covered by the Davis-Bacon Act).

(2) Any work required to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act (i.e., specifications or requirements for the procurement of materials, supplies, articles, and/or equipment).

(3) Any contracts for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line, or oil or gas pipeline where published tariff rates are in effect.

(4) Any contract for the furnishing of services by radio, telephone, telegraph, or cable companies, subject to the Communications Act of 1934.

(5) Any contract for public utility services, including electric light and power, water, steam, and gas.

(6) Any employment contract providing for direct services to a Federal Agency by an individual or individuals.

(7) Any contract with the Post Office Department (now the U.S. Postal Service), the principal purpose of which is the operation of postal contract stations.

The DOL's regulations at 29 CFR, Part 4, Sections 4.116 through 4.122 provide further explanation of these statutory exemptions.

b. In addition, Section 4(b) of the Act grants the Secretary of Labor the authority to issue limitations, tolerances and exemptions. Thus, the Secretary of Labor has exempted from SCA coverage certain contracts as set forth at 29 CFR 4.123. While the list of exemptions listed therein is extensive, there are many instances where the applicability of the Act is not clear. The sections that follow, therefore, detail certain exemptions as well as applicability determinations of particular interest to USACE.

3-8. Federal Information Processing Resources Contracts.

a. Contracts for Federal Information Processing (FIP) resources (automatic data processing equipment, software services, support services, maintenance, related supplies, and systems) which require the use of service employees are generally subject to the provisions of the SCA, except as noted in paragraphs b and c below.

b. Contracts for Maintenance or Repair of Automated Data Processing Equipment. The Secretary of Labor has set forth an exemption from the Act's coverage contracts principally for the maintenance, calibration and/or repair of certain automated data processing (ADP), scientific and medical, and office business equipment. This exemption may be found within the regulations at 29 CFR 4.123(e). However, since that regulation neither defines nor lists the types of ADP equipment excluded from SCA coverage, the Department of Labor issued further guidance in its All Agency Memorandum No. 149, dated 21 March 1989 (Appendix B). Therein, the DOL indicates that it has adopted the functional definition of ADP equipment within the Brooks Act, 40 USC 759. However, since neither 29 CFR 4.123(e) nor All Agency Memorandum No. 149 contain the Definition of ADP equipment within the Brooks Act, it is set forth below:

"...(T)he term 'automatic data processing equipment' means any equipment or

1 Aug 01

interconnected system or subsystems of equipment that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching interchange, transmission, or reception, of data or information ---

- (i) by a Federal agency, or
- (ii) under a contract with a Federal agency which--
 - (I) requires the use of such equipment, or
 - (II) requires the performance of a service or the furnishing of a product which is performed or produced making significant use of such equipment.

...(S)uch term includes ---

- (i) computers;
- (ii) ancillary equipment;
- (iii) software, firmware, and similar procedures;
- (iv) services, including support services; and
- (v) related services as defined by regulations issued by the Administrator for General Services.

This exemption is limited to the servicing of only such listed items of equipment furnished to the government which are also furnished commercially, the contract services must be furnished at catalog or market prices, and the contractor must utilize the same compensation plan for all service employees performing on both government and commercial work. The contractor must certify to all of these conditions in the contract. These requirements, as well as the contractor certification, are contained in the contract clause set forth at FAR 52.222-48. In addition, the CO is required to make an affirmative determination that the conditions of the exemption have been met prior to contract award. In this regard, the General Services Board of Contract Appeals (GSBCA), in the Electronic Genie, Inc. case, 90-3 BCA 23,045, held that a push-button telephone is "ADP equipment" under the Brooks Act. Therefore, under the GSBCA's ruling, contracts for the maintenance, calibration and/or repair of push-button telephone equipment would qualify for the SCA exemption.

c. Work Performed by Computer Programmers, Systems Analysts and "Other Skilled Professional Workers". In 1990, Congress amended the Fair Labor Standards Act (see Section 2 of Public Law No. 101-583) to provide that "computer systems analysts, computer programmers, software engineers and other similarly skilled professional employees" are to be exempt as "executive, administrative or professional employees under Section 13(a)(1) of the Fair Labor Standards Act." It further provided that such employees would be exempt even if they are paid on an hourly basis if their hourly rate of pay is at

least 6.5 times greater than the applicable minimum wage rate under Section 6 of the Act. As a result of this exemption under the FLSA, such workers would also be exempt from the SCA. (See 29 CFR 541.3(e))

3-9. Carpet Installation. As noted in Section 3-7, the SCA exempts from coverage contracts for construction, alteration, and/or repair including painting or decorating of public buildings or public works which are subject to the Davis-Bacon Act. Where carpet laying is performed as an integral part of, or in conjunction with, "new" construction, alteration, or reconstruction of a public building or public work, as opposed to routine maintenance, the Davis-Bacon Act would apply. However, where the installation of carpeting is performed as a separate contract and is not an integral part of either a construction project or incidental to a supply contract, the installation work would be subject to the SCA.

3-10. Overhaul and Modification of Aircraft and Other Equipment.

a. As noted in paragraph 3-7, the SCA exempts from its provisions "any work required to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act." DOL regulations set forth at 29 CFR 4.117 provide detailed guidelines for delineating when contracts for major overhaul of equipment would be considered "remanufacturing" subject to the Walsh-Healey Act rather than the SCA. Complete or substantial tear down and overhaul of heavy construction equipment, aircraft, engines, etc. where the government receives a totally rebuilt end item with a new (or nearly new) life expectancy resulting from processes similar to original manufacturing will normally be considered "remanufacturing" subject to the Walsh-Healey Act. Additional guidance distinguishing remanufacturing from repair of equipment is set forth at FAR 22.1103-6.

b. Contracts for routine maintenance or repair, inspection, etc. are subject to the SCA.

3-11. Shipbuilding, Alteration and Repair.

a. Subpart 36.102 of the FAR states in part that the term "construction contract" does not apply to construction of "vessels." The above FAR guidance is apparently based on certain legislative enactments (52 Stat. 403; 72 Stat. 839) providing that each contract for the construction, alteration, furnishing or equipping of a naval vessel is subject to the Walsh-Healey Act. However, the Secretary of Labor, who is tasked with the administration of both the Davis-Bacon and Walsh-Healey Acts, has interpreted the aforementioned references to Walsh-Healey Act as applying only to the construction of naval (U.S. Navy and U.S. Coast Guard) vessels. Thus, Corps of Engineers contracts calling for the construction,

1 Aug 01

alteration or repair of vessels are subject to the Davis-Bacon Act, except as noted in the next paragraph.

b. Where a project involving construction or alteration is advertised and the site of work is known, wage rates must be requested in accordance with FAR 22.404-3. The labor standards provisions required for construction contracts must be included in the specifications. However, where the contract is advertised and the site of work is not known, the contract will be exempt from the requirements of the Davis-Bacon Act. In this regard, refer to 38 Attorney General 412-424; 17 Comp. Gen. 585; and FAR 22.402 (a)(1)(I). Thus, for example, the Davis-Bacon Act would apply to the construction of Corps vessels under the following conditions: (1) the construction services can only be procured from only one responsible source, and (2) the services must be performed at a government specified site. These examples are not intended to be all-inclusive.

c. A contract which calls for the maintenance and/or cleaning, rather than alteration or repair, of a ship or naval vessel is a service contract within the meaning of the SCA. Thus, for example, where mechanical components are removed from vessels and sent to a contractor's plant to be overhauled, such work is subject to the SCA.

d. Prospective contracts relating to the above where there is uncertainty as to labor standards coverage may be referred to the Office of the Chief Counsel, Attn: CECC-C, for coordination with the DOL.

3-12. Mapping and Surveying Services.

a. The issue of SCA coverage of mapping and surveying services was recently raised in connection with Office of Federal Procurement Policy Act Amendments of 1988 (Public Law 100-679). The DOL has advised that the Act applies to any contract for services which may involve the use of service employees to a significant or substantial extent, even though there is some use of bona fide executive, administrative, or professional employees (see 29 CFR 4.113). Unfortunately, there are neither statutory nor regulatory criteria (i.e., percentage of contract cost) available to assist Contracting Officers in determining significant or substantial extent. Thus, the CO should request SCA wage rates whenever "service employees" are required.

b. The request process described below does not represent a change in the DOL's SCA regulations (29 CFR, Part 4); rather, it reflects a revision in the SCA request and response policy relating to surveying and mapping services procured by the Corps through Brooks Act selection procedures (40

U.S.C. 541-544). This change is predicated upon the unique characteristics of the surveying and mapping procurement process as well as the unique characteristics of employment within this industry sector. As provided by applicable statute (33 U.S.C. 569b), the Corps is required to procure surveying and mapping services by means of the qualification-based selection process of the Brooks Architect-Engineer Act (40 U.S.C. 541 - 544). The Brooks Act requires the selection of the most highly qualified firms based on demonstrated competence and professional qualifications, and negotiation of a fair and reasonable price, starting with the most highly qualified firm. Surveying crews are generally permanent employees who operate out of a certain branch or home office. These workers are seldom hired on a local basis for a specific project. Their compensation is primarily determined by the location of their base office, and not the location of their work assignments which may cross various counties on a daily or even hourly basis. This, in combination with the indefinite nature of surveying and mapping contracts, has created an administrative burden for both the Corps and contractors in attempting to reconcile such features with a SCA wage determination keyed solely to the exact place of performance.

c. In response to the above concerns, the DOL has agreed to the following revision in their SCA wage determination issuances for surveying and mapping service contracts. Once the most highly qualified firms have been identified and the home or base office from which the affected personnel will be dispatched can also be identified, the Contracting Officer should then submit the required SF 98, *Notice of Intention to Make A Service Contract* to the DOL. The DOL's new policy requires Contracting Officers to annotate the SF 98 to reflect the unique features of surveying and mapping services procurement based on the Brooks Act procedures. For example, Box 5, *Place of Performance*, will indicate the firm's home or base office. The wage determination furnished will therefore be based on this location. Box 6, *Services To Be Performed*, should indicate that the procurement is an indefinite delivery contract for the acquisition of surveying and mapping services through the Brooks Act.

3-13. Architect-Engineer (A-E) Services. The DOL has also indicated that A-E contracts substantially performed through the use of service employees may also be subject to the SCA. The DOL has previously advised USACE that A-E contracts may be subject to the SCA. In this regard, the DOL has published a list of illustrative services which are subject to the SCA at 29 CFR 4.130. (A less detailed listing is set forth at FAR 22.1003-5). Although A-E services are not specifically cited by DOL, the list does include computer services, drafting and illustrating, exploratory drilling (other than part of construction), surveying and mapping (not directly related to construction). COs are therefore advised to be cognizant of the extent and nature of non-professional service employees required under A-E contracts.

1 Aug 01

3-14. Park/Gate Attendant Services.

a. With respect to the applicability of the SCA to park/gate attendant services performed by family-owned businesses under Operation & Maintenance contracts, the DOL has also determined that such services are covered by the Act. Section 8(b) of the Act defines service employee as:

"any person engaged in the performance of a service contract, except those persons who are employed in a bona fide executive, administrative, or professional capacity as those terms are defined in Regulations, 29 CFR 541, regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such person."

b. Park/gate attendants would therefore be service employees within the meaning of the Act, and any subcontract entered into for such services would be a covered service contract, regardless of whether or not the contractor is a family-owned business such as those euphemistically referred to as "Ma-and-Pa" type enterprises. Similarly, the DOL has indicated that the opening and locking of gates appears to be "watchmen or guard" type activities for purposes of the Contract Work Hours and Safety Standards Act (CWHSSA). To the extent that park/gate attendants perform CWHSSA covered activities in excess of 40 hours per week, they would also be entitled to receive CWHSSA premium compensation.

c. SCA coverage of "Ma-and-Pa" park/gate attendant subcontracts noted above may be distinguished from prime contracts with "Ma-and-Pa" enterprises for park/gate attendant services. The Act specifically exempts any employment contract providing for direct services to a Federal Agency by an individual or individuals (see 41 USC 356; 29 CFR 4.121; FAR 22.1003-2(f)).

3-15. Demolition, Dismantling, and Removal of Improvements

a. Property demolition, dismantling and removal contracts which involve demolition of buildings or other structures are subject to the SCA when their principal purpose is the furnishing of dismantling or removal services, and no further construction at the site is contemplated. If further construction is contemplated, even by separate contract, then the contract would be subject to the Davis Bacon Act (see 29 CFR 4.116(b) and FAR 37.301).

b. However, these regulations appear to address those situations where both the specific location and exact nature of subsequent construction activities are intended. Such situations can be distinguished

from the debris removal activities required in the aftermath of emergencies such as Hurricanes Andrew and Iniki or the 1993 floods. Typically, the cleanup and debris removal following such disasters are performed on an immediate basis and are not procured by fixed-price type contracts. Rather, due to the urgent nature of the services to be procured, initial USACE activities are generally comprised of cost-reimbursable contracting efforts. In addition, these cleanup and debris removal efforts would be performed prior to, and independent of, survey and engineering studies which would identify the location and extent of necessary repairs. In view of these circumstances, the DOL has concurred in the determination that USACE disaster relief efforts, including debris removal, and subsequent efforts, such as levee repairs may be viewed as discrete activities. Thus, emergency cleanup and debris removal activities would generally be subject to the provisions of the SCA.

c. The DOL, in All Agency Memorandum No. 153 (Appendix C), provided guidance on the application of the DBA to contracts for asbestos and/or paint removal. The DOL advises that the removal of asbestos or paint from public buildings or public works constitutes building alteration within the statutory language of the DBA. Such asbestos or paint removal clearly alters those buildings or works, regardless of whether subsequent re-insulating or repainting is being considered. This view is consistent with previous determinations that contracts for sandblasting or hydrostatic cleaning of public works are subject to the DBA. The subject All Agency Memorandum thus applies to contracts for construction, alteration, and/or repair of public buildings or works. However, if asbestos is being removed as part of an overall demolition contract, then such asbestos removal would be subject to the SCA.

3-16. Mixed or Hybrid Contracts.

a. One of the more troublesome issues in determinations of SCA applicability and coverage relates to mixed or hybrid contracts, those that are comprised of separate service, construction or manufacturing elements. DOL regulations in this regard indicate that where such hybrid elements are present, the SCA will apply only if the principal purpose of the contract is principally for services. If the principal purpose of the contract is for the furnishing of items other than service, then the SCA would not apply.

b. If it is determined that the principal purpose of a contract is the procurement of services, there are circumstances where the CO must also incorporate other labor standards provisions. The regulatory criteria by which such determinations are made is set forth at FAR 22.402(b); 29 CFR 116(c)). Generally, the CO must also incorporate DBA clauses to non-service construction work if:

- (1) the service contract includes a substantial and segregable amount of construction, alteration,

1 Aug 01

renovation, painting, or repair work; and

(2) the aggregate of such work exceeds or is expected to exceed \$2,000.

c. While there are an indefinite number of possible hybrid contracts, two areas are discussed in the paragraphs that follow insofar as they have generated significant concern within USACE: (1) installation support service contracts and (2) certain environmental restoration projects.

3-17. Installation Support Contracts. Certain installation support contract requirements such as custodial work or snow removal may be easily identified as being subject to the SCA. Certain other installation requirements such as roof shingling, building structural or paving repairs may also be easily identified as being subject to the DBA. Certain other work items may not be so easily identifiable. For example, replacing broken windows, spot painting, or minor patching of a wall could be subject to either the DBA or the SCA. In order to distinguish whether work required under a contract or work order is SCA maintenance or DBA painting/repairs, the Army Labor Advisor, in conjunction with the DOD FAR Labor Committee, developed specific thresholds which are set forth at DFARS 222.402-70(d).

a. Individual service calls or orders which will require a total of 32 or more work-hours to perform shall be considered to be repair work subject to the DBA.

b. Individual service calls or orders which will require less than 32 work-hours to perform shall be considered to be repair work subject to the SCA.

c. Painting work of 200 square feet or more to be performed under an individual service call or order shall be considered to be subject to the DBA regardless of the total work-hours required.

d. The determination of labor standards application shall be made at the time the solicitation is prepared in those cases where the requirements can be identified. Otherwise, the determination shall be made at the time the service call or order is placed against the contract. The service call or order shall identify the labor standards law and contract wage determination which will apply to the work required.

3-18. Environmental Restoration Contracts.

a. As a result of USACE's increasing mission in the area of environmental restoration through the Defense Environmental Restoration Program (DERP) as well as work for others (i.e., EPA Superfund),

evolving remediation methodologies and innovative contracting strategies (i.e., Rapid Response, Total Environmental Restoration Contracts), much of USACE's experience with respect to the application of appropriate labor standards has been developed incrementally. Such determinations have proven particularly difficult where elements of both construction and service are required. USACE's Rapid Response contracts, for example, are deemed to be contracts principally for service with provision for construction activities that may be both substantial and segregable (see 29 CFR 4.116).

b. Typical construction activities at an environmental restoration site may include:

- (1) Construction of either temporary or permanent water treatment system.
- (2) Excavation, consolidation, capping of contaminated soil, backfilling, regrading, and reseeded of excavated areas.
- (3) Construction of a water distribution system.
- (4) Installation of a security fence/warning signs.

c. A service activity can be performed by either professional or non-professional personnel. Typical service activities at environmental restoration sites may include:

- (1) Maintenance, overhaul, repair, servicing, rehabilitation, salvage, modernization, or modification of supplies, systems, or equipment.
- (2) Engineering and technical services.
- (3) Operation of government-owned equipment, facilities, and systems.
- (4) Transportation and related services.
- (5) Research and development.
- (6) Chemical testing and analysis.
- (7) Data collection and analysis.

(8) Geological field surveys and testing.

(9) Laboratory analysis.

(10) Landscaping (other than as part of construction).

(11) Solid waste removal.

(12) Operation and maintenance of treatment units (i.e., incinerator units, pugmill systems, water treatment plants).

d. Three examples serve to illustrate the substantial and segregable standard for incorporation of DBA provisions.

(1) In an action that calls for the removal and disposal of drums of hazardous waste, the contract/delivery order is principally for service (removal/disposal). However, site set-up requires some incidental construction activities such as electrical hook-up, construction of stairs for project offices, clearing and construction of access roads, etc. These activities are not substantial relative to the overall scope of the action.

(2) In an action that calls for excavation and off-site disposal of contaminated soil, the principal purpose of the contract/delivery order is service (removal of soil through transportation and disposal). The excavation and staging of the soil is an activity which is substantial, and can be functionally separated from the transportation and disposal.

(3) In an action that calls for the excavation and on-site incineration of the contaminated soil, the principal purpose of the contract/delivery order is still service (treatment of the contaminated soil). In this case, excavation is substantial, but as a practical matter may not be segregable from the incineration of the soil if the activity is continuous and is to be performed by the same contractor employees. However, if the two activities are phased, or if the excavated material is to be temporarily contained, the incineration is then capable of being segregated from the excavation and should be treated accordingly. Appendix D provides a summary view of the above decision-making process.

3-19. Exploratory Drilling. Contracts for subsurface exploration, which have as their principal purpose

the furnishing of technical information, together with soil samples and rock cores, and/or a record to the government of what was encountered during subsurface drilling, are subject to the SCA if such drilling operations are not directly connected with the construction of a public work. The DOL has ruled that contracts for drilling are covered by the DBA when they are directly related and incidental to, or an integral part of the actual construction process. Further, contracts for the digging of test holes which may later become public works or permit conversion to water wells are covered by the DBA.

3-20. Work Performed by the Contractor Alone. The SCA does not apply where the CO knows in advance that the contractor alone will perform the services, since no service employees are utilized in such case. (Wage & Hour Opinion Letter 512, September 23, 1966).

3-21. State and Municipal Employees. States and their political subdivisions may obtain a Federal service contract and undertake to perform it with state or municipal employees (e.g., police, fire, or trash removal services). The SCA does not contain an exemption for contracts performed by state or municipal employees. Thus, the SCA will apply to contracts with states or political subdivisions in the same manner as to contracts with private contractors (see 29 CFR 4.110).

3-22. USACE Law Enforcement Contracts Under the Water Resources Development Act. Section 120 of the WRDA (P.L. 94-587, 90 Stat. 29240 as amended by Section 101 of Public Law 96-536 (94 Stat. 3168)) provides authority for the Secretary of the Army, acting through the Commander, USACE, to contract with states and their political subdivisions for the purpose of obtaining increased law enforcement services at water resources development projects under the jurisdiction of the Secretary of the Army. The DOL has advised the Corps that they view Section 2(a) of the SCA as applicable to such services. The DOL maintains that the statutory language is clear. The Act applies to "every contract entered into by the United States or the District of Columbia in excess of \$2,500, except as provided in Section 7 of this Act...the principal purpose of which is to furnish services in the United States through the use of service employees..." (Emphasis added.) In this regard, there is no limitation in the Act regarding the beneficiary of contract services, nor is there any indication in the legislative history that only contracts for services of direct benefit to the government, as distinguished from the general public, are subject to the Act. (see 29 CFR 4.133 (a)). Further, the provisions of the CWHSSA are to be incorporated within these contracts. Covered employees are entitled to the required overtime premium to the extent that they perform contract work in excess of 40 hours. In submitting SCA wage rate requests to the DOL, COs are advised to clearly indicate that the subject solicitation will be a sole-source type procurement. The DOL has recommended that such information be furnished within Block 6, Services to Be Performed, of the Standard Form SF 98, Notice of Intention to Make a Service Contract.

1 Aug 01

3-23. Contracts with the National Guard. Contracts for the operation and maintenance of state National Guard training and logistical facilities are generally not subject to the SCA. While the National Guard Bureau provides full or partial funding for these contracts, services are provided directly to the states and not the U.S. Government. The states independently obtain services to support training and logistical facilities for each state National Guard unit. Contracts are signed by state officials and are administered by the individual states according to state contracting procedures. However, contracts entered into between the National Guard Bureau, DOD, and state National Guard units which provide for the acquisition of services for the direct benefit or use of the National Guard Bureau and which are signed by a U.S. Property and Fiscal Officer would be subject to SCA.

3-24. Contracts Between a Federal or District of Columbia Agency and Another Such Agency. Prime contracts between a Federal or District of Columbia agency and another such agency are not subject to the SCA. However, "subcontracts" awarded under "prime contracts" between the Small Business Administration and another Federal agency pursuant to various small business/minority set-aside programs, such as the 8(a) program, are covered by the SCA. For further information in this matter, refer to 29 CFR 4.110.

3-25. Civilian Non-Appropriated Fund Contracts. The SCA applies to all labor intensive contracts that provide services to civilian non-appropriated fund instrumentalities (NAFI). Cafeterias, restaurants, food services, and vending services are examples of civilian NAFI contracts to which the SCA applies. (See AR 215-7, paragraph 2-30).

3-26. Carriage of Freight or Personnel. Administrative Contracting Officers (ACOs) should be aware of actions which have affected the applicability of the SCA to certain contracts relating to the carriage of freight or personnel by motor carriers where published tariff rates are in effect. By way of background, it is noted that Section 7(3) of the Act had provided for an exemption of the Act's coverage for these and similar services. However, the DOL has re-examined this application of this exemption and the implementing regulations (29 CFR 4.118) in light of two recent legislative actions relating to the de-regulation of the transportation industry. As a result of the Trucking Industry Regulatory Reform Act of 1994 (P.L. 103-311) and the Federal Aviation Administration Authorization Act of 1994 (P.L. 103-305), interstate and intrastate motor common carriers providing transportation of property, other than household goods, are no longer required to file tariff rates with the Interstate Commerce Commission or any state. Accordingly, motor carriers, with the very limited exceptions noted within the subject Memorandum, no longer qualify for the exemption set forth at Section 7(3) of the Service Contract Act.

3-27. Exemption for Certain Commercial Service Contracts. Based on a request from the Office of Federal Procurement Policy to the Secretary of Labor, the Secretary has determined that certain contracts for commercial services meeting specific criteria may be exempt from the Act's coverage. Proponents of such exemptions have maintained that in certain situations, an employee's work on a government contract represents a small portion of his or her time and the balance of the time is spent on commercial work. The Office of Federal Procurement Policy reasoned that in such cases the Government loses the full benefits of competition for its service contracts because some contractors decline to compete for Government work due to specific government requirements. In recognition of such situations, the Secretary of Labor has developed an exemption framework that would protect prevailing labor standards and avoid the undercutting of such standards by contractors. These criteria are intended to limit the exemption to those procurements where the services being procured are such that it would be more efficient and practical for an offeror to perform the services with a workforce that is not primarily assigned to the performance of government work. Thus, contracts for base support services where an on-site dedicated workforce performs the work would not meet the exemption criteria. Also, contracts where the services have been performed by a dedicated group of federal employees (A-76 procurements) would be unlikely to meet the exemption criteria since the nature of the services would not meet the requirement that the workers perform only a small part of their time on the contract. However, it is possible that some subcontracts for a portion of those services might meet the criteria for exemption. The paragraphs below summarize the Secretary of Labor's Final Rule with respect to "commercial item" exemptions. The rule, published in the Federal Register on 18 January 2001, amending 29 CFR 4.123, became effective on 19 March 2001. Each of the criteria must be satisfied and the Secretary of Labor has reserved the right to review such determinations.

a. The services under the contract are commercial--i.e., they are offered and sold regularly to non-Governmental customers, and are provided by the contractor (or subcontractor in the case of an exempt subcontract) to the general public in substantial quantities in the course of normal business operations.

b. The prime contract or subcontract will be awarded on a sole source basis or the contractor will be selected for award on the basis of other factors in addition to price. In such cases, price must be equal to or less important than the combination of other non-price or cost factors in selecting the contractor.

c. The prime contract or subcontract services are furnished at prices which are, or are based on, established catalog or market prices. An established price is a price included in a catalog, price list,

1 Aug 01

schedule, or other form that is regularly maintained by the contractor or subcontractor, is either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public. An established market price is a current price, established in the usual course of trade between buyers and sellers free to bargain, which can be substantiated from sources independent of the manufacturer or contractor.

d. Each service employee who will perform services under the Government contract or subcontract will spend only a small portion of his or her time (a monthly average of less than 20 percent of the available hours on an annualized basis, or less than 20 percent of available hours during the contract period if the contract period is less than a month) servicing the Government contract or subcontract.

e. The contractor utilizes the same compensation (wage and fringe benefits) plan for all service employees performing work under the contract or subcontract as the contractor uses for these employees and for equivalent employees servicing commercial customers.

f. The contracting officer (or prime contractor with respect to a subcontract) determines in advance, based on the nature of the contract requirements and knowledge of the practices of likely offerors, that all or nearly all offerors will meet the above requirements. If the services are currently being performed under contract, the contracting officer or prime contractor shall consider the practices of the existing contractor in making a determination regarding the above requirements.

g. The contractor certifies in the prime contract or subcontract, as applicable, to the provisions in paragraphs (1), and (3) through (5). The contracting officer or prime contractor, as appropriate, shall review available information concerning the contractor or subcontractor and the manner in which the contract will be performed. If the contracting officer or prime contractor has reason to doubt the validity of the certification, SCA stipulations shall be included in the contract or subcontract.

3-28. Application of Commercial Service Contract Exemption. The DOL has set forth a listing of service contracts that where the above criteria are satisfied will be exempt from the applicability of the SCA. While these services are briefly noted below, Contracting Officers are encouraged to carefully review the conditions under which the exemptions are effective.

a. Automobile or other vehicle (*e.g.*, aircraft) maintenance services (other than contracts to operate a Government motor pool or similar facility).

- b. Financial services involving the issuance and servicing of cards (including credit cards, debit cards, purchase cards, smart cards, and similar card services).
- c. Contracts with hotels/motels for conferences, including lodging and/or meals which are part of the contract for the conference (which shall not include ongoing contracts for lodging on an as needed or continuing basis).
- d. Maintenance, calibration, repair and/or installation (where the installation is not subject to the Davis-Bacon Act, as provided in § 4.116(c)(2)) services for all types of equipment where the services are obtained from the manufacturer or supplier of the equipment under a contract awarded on a sole source basis.
- e. Transportation by common carrier of persons by air, motor vehicle, rail, or marine vessel on regularly scheduled routes or via standard commercial services (not including charter services).
- f. Real estate services, including real property appraisal services, related to housing federal agencies or disposing of real property owned by the Federal Government.
- g. Relocation services, including services of real estate brokers and appraisers, to assist federal employees or military personnel in buying and selling homes (which shall not include actual moving or storage of household goods and related services).